Supreme Court, U.S.
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No. 97-1459

In The

Supreme Court of the United States

October Term, 1997

LORILLARD, INC.,

Petitioner,

v.

MILTON HOROWITZ and SHIRLEY HOROWITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LISTING OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal of California were:

Plaintiffs/Respondents:

Milton Horowitz

Shirley Horowitz

Defendants/Appellants:

Lorillard, Inc.

Hollingsworth & Vose Company

RULE 29.6 STATEMENT

Petitioner Lorillard, Inc. states that Lorillard, Inc. is a owned subsidiary of Loews Corporation. Lorillard, Inc. has no non-wholly owned subsidiaries.

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INTRODUCTION

The respondents admit in their Opposition to Lorillard's petition that a twenty-year-old split in authority exists regarding the circumstances in which punitive damages may properly be imposed upon a successor corporation. The respondents raise three points in their Opposition, none of which has merit:

- The respondents argue that since most of the courts involved in the split of authority did not say the words "due process" in their opinions, they were not deciding due process claims. In fact, all of the cases relied upon by Lorillard turned on principles of substantive and procedural due process.
- The respondents claim that Lorillard failed to properly raise the question presented before the trial and appellate court, and that the appellate court did not rule on the issue. The record is clearly to the contrary.
- The respondents claim that the petition should be denied because the appellate court properly affirmed the punitive damages award. This argument is premature and based upon mistaken characterizations of the record.

The petition for writ of certiorari should be granted.

ARGUMENT

I. THE RESPONDENTS ADMIT THE EXISTENCE OF THE SPLIT IN AUTHORITY REGARDING THE IMPOSITION OF PUNITIVE DAMAGES ON SUCCESSOR CORPORATIONS

The respondents concede that a split in authority exists regarding the circumstances under which a successor-in-interest may be assessed punitive damages based upon the conduct of its predecessor. In seven of the eighteen cases cited by Lorillard, the petitioners admit, "the courts held that the successor assumed the punitive damages liabilities of its predecessor either expressly in the corporate merger agreement or under the relevant jurisdiction's corporate merger statute." (Opposition, p. 12.) In the remaining eleven cases, on the other hand, "the courts . . . analyzed the particular facts as allowing punitive damages in some cases but not in others." (Opposition, pp. 12-13.) Thus, both Lorillard and the respondents agree that "[u]nless the split in authority is resolved, the availability of punitive damages in such cases will depend on what jurisdiction a plaintiff files suit in." (Petition, p. 13.)

The respondents' only quibble is that the courts involved in this twenty-year-old split of authority have not, for the most part, used the words "due process" in analyzing the principles involved. Nevertheless, the cases cited by Lorillard in its Petition all involve due process principles.

The Sixth Circuit and the Supreme Courts of West Virginia and Wisconsin have found that the imposition of punitive damages against successor corporations is

impermissible unless the goals of punishment and deterrence would be served, a conclusion based on the principles of substantive due process. In *Drayton v. Jiffee Chemical Corp.*, 395 F.Supp. 1081, 1098 (N.D. Ohio, 1975), the District Court considered the same question at issue here: whether a successor-in-interest could fairly be held liable for the culpable conduct of its predecessor. The District Court held that it could not, and the Sixth Circuit affirmed. *Id.*; *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 366 (6th Cir. 1978).

Similarly, in *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988) the appellant argued that punitive damages could not be assessed against a successor corporation without proof of independent wrongdoing. *Id.* at 1215, n.27. The Sixth Circuit agreed that a punitive award was not appropriate where the successor was "a new and different entity" who had not continued the wrongful activities. *Id.*

In *Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E.2d 557 (1992), the Supreme Court of West Virginia declined to mechanically apply a state statute which provided that a successor automatically acquired the liabilities of its predecessor in a merger. 187 W.Va. at 571, n.5, 420 S.E.2d at 562, n.5. Instead, the Court found that it would be fair and reasonable to impose punitive damages on successor corporations only where the successor had knowingly continued to manufacture and market a product which the successor knew was dangerous. 187 W.Va. at 573, 420 S.E.2d at 564. The Supreme Court of Wisconsin concurred with the *Davis* court's approach in *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 293 N.W.2d 897 (1980), relying upon the successor corporation's continuation of

the wrongful conduct after the merger and the virtual identity of corporate directors between the predecessor and successor to affirm the imposition of punitive damages against the successor. 97 Wis. 2d at 152-156, 293 N.W.2d at 905-07.[1]

The cases described above all implicitly recognize that punishment of innocent parties is substantively improper. But the Fifth Circuit and the Supreme Courts of Rhode Island and Florida, when confronted with successor liability cases, have held that mere notice through the language of a merger statute that punitive liabilities will be passed along is sufficient to justify the imposition of punitive damages against successor corporations.

For example, in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992), the appellant challenged the punitive damages award on substantive due process grounds, arguing that imposition of punitive damages would satisfy neither the goals of punishment or deterrence. 946 F.2d at 1094. The Fifth Circuit disagreed, finding that punitive liabilities were automatically passed along in a merger and subsequent

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[1] In *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 370-71, 469 A.2d 655, 666-67 (1983), *vacated on other grounds*, 508 Pa. 154 n.16, 494 A.2d 1088 n.16, the court concluded that punitive damages could be imposed upon successor corporation only where the goals of punishment and deterrence would be served. *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 156-57, 493 A.2d 1337, 1341 (1985) adopted the *Martin* test. The court in *Sheppard v. AC&S, Inc.*, 484 A.2d 521, 526 (Del. Super. 1984) declined to rule out punitive damages based upon evidence that the successor corporation had continued to market the product with knowledge of its dangers.

stock purchase agreement. *Id.* at 1094-95. The appellant in *City of Richmond v. Madison Management Group, Inc.*, 918 F.2d 438 (4th Cir. 1990) made the same argument, *id.* at 455, with the same result. *Id.* at 455-56. The petitioner in *Celotex Corp. v. Pickett*, 490 So.2d 35 (Fl. 1986) made the same argument as well, 490 So.2d at 38, but the court found that the goals of punishment and deterrence would be served by imposition of punitive damages on the successor. *Id.* Finally, the Supreme Court of Rhode Island acknowledged in *Douglas v. Bank of New England*, 566 A.2d 939, 942 (R.I. 1989) that the appellant had raised a due process challenge to the award of punitive damages by the trial court.

The respondents admit that a twenty-year-old split of authority exists regarding the circumstances under which punitive damages may be imposed upon a successor corporation for the acts of its predecessor. The respondents' claim that this Court should not address this admitted split in authority because many of the courts have not used the words "due process" in their opinions is meritless – all of the cases revolve around the due process questions of whether punishment can be inflicted upon an innocent party, and when the imposition of punitive damages on a successor serves the goals of punishment and deterrence.

Lorillard has demonstrated the existence of a split of authority on an important federal question. The petition should be granted.

II. THE QUESTION PRESENTED BY LORILLARD WAS PROPERLY RAISED AND DECIDED BELOW, SO THIS COURT HAS JURISDICTION OVER THE PETITION

Respondents claim that Lorillard has failed to invoke the jurisdiction of this Court because the question it seeks to have reviewed was not properly raised and decided in the trial and appellate courts below. (Opposition, pp. 7-10.) Not true.

During the trial, Lorillard filed a motion in limine, arguing that punitive damages could not be imposed upon Lorillard for the actions of its distant predecessor-in-interest, P. Lorillard, and that the goals of punitive damages, punishment and deterrence, required proof of wrongdoing by Lorillard itself. (App., 1-11.) Imposition of punitive damages without such proof, Lorillard argued, would violate the due process clause. (App. 11; CT 1754.) The respondents opposed the motion, arguing that "A punitive damage award in this case is constitutional and not violative of due process." (CT 1727.) The trial court denied Lorillard's motion. (Petition, p. 37a.)

Lorillard raised the issue again before the California Court of Appeal, discussing the question extensively in its Opening and Reply Briefs. (App., 12-21) The Court of Appeal correctly understood Lorillard's argument: "Finally, [Lorillard] argue[s] there is no substantial evidence of [Lorillard's] wrongdoing to support an award of punitive damages, and consequently the punitive damage award violates the Federal due process clause." (Petition, p. 24a.) The Court of Appeal decided the issue, holding that punitive liabilities were automatically passed along

in the various mergers which led from P. Lorillard to Lorillard, and that P. Lorillard's wrongdoing was sufficient to support the award of punitive damages against Lorillard. (Petition, pp. 24a-30a.) Lorillard raised the issue again in its Petition for Review to the California Supreme Court, but the petition was denied.

Thus, Lorillard has properly invoked the jurisdiction of this Court over the Petition.

III. THE RESPONDENTS' CLAIM THAT PUNITIVE DAMAGES WERE PROPERLY IMPOSED UPON LORILLARD IS PREMATURE AND IS BASED UPON A MISUNDERSTANDING OF THE BURDEN OF PROOF

Finally, the respondents claim that the petition should be denied because "the court below properly affirmed the assessment of punitive damages against Lorillard." (Opposition, p. 17.)

The respondents' argument suffers from two flaws. First, the question of whether Lorillard can satisfy the proper test for imposition of punitive damages upon a successor-in-interest has nothing to do with whether this petition should be granted. (Supreme Court Rules, Rule 10.) Although Lorillard vigorously disputes the respondents' claim that punitive damages were properly assessed here, the time for briefing and deciding that issue is on remand to the trial court, after this Court determines the proper test to be applied and the parties can fully develop the relevant facts.

The respondents claim that Lorillard would still be subject to punitive damages even if the trial court had

applied the test adopted by the Sixth Circuit and the Supreme Courts of West Virginia and Wisconsin. According to the respondents, Lorillard has offered no evidence to prove that "P. Lorillard's ownership, directors, officers, corporate practices, or products changed in any way" after the various mergers. (Opposition at 17.)

The respondents misconstrue the burden of proof. Since they are seeking punitive damages in this action, *the respondents* have the burden of proving that punitive damages are justified and proper under the facts and circumstances. (California Civil Code, Section 3294(a).) Thus, on remand, the respondents will be required to demonstrate that punitive damages are appropriate under the test set forth by this Court.

Besides, the respondents are wrong in claiming that Lorillard failed to demonstrate that it is an independent, unrelated successor-in-interest to P. Lorillard, and that the conduct at issue had stopped years before P. Lorillard was purchased by an unrelated company. There is no dispute that P. Lorillard was acquired in November 1968 by Loews Theaters, Inc. RT 2328-29. Loews Theaters, Inc. was completely independent of P. Lorillard at the time of the merger. There is also no dispute that P. Lorillard ceased manufacturing the asbestos-containing Kent cigarette filter in 1956, and the filter has not been manufactured or marketed since. (Petition, pp. 3-4.) Lorillard, the distant successor-in-interest to P. Lorillard, has done nothing wrong. Consequently, if this Court adopts the test for imposition of punitive damages on successor corporations followed by the Sixth Circuit and the Supreme Courts of West Virginia and Wisconsin, the

punitive damages award against Lorillard must be reversed.

CONCLUSION

Petitioner Lorillard demonstrated in its Petition that a twenty-year-old split of authority exists among the Circuits and the state courts of last resort respecting the circumstances in which a successor corporation may be assessed punitive damages without proof of independent wrongdoing. The respondents concede that the split exists and offer no valid response to Lorillard's arguments.

The respondents admit that the eighteen state and federal cases cited by Lorillard as proof of the split in authority differ markedly in their approach to imposition of punitive damages on successor corporations.

Contrary to the respondents' representations, the record plainly shows that Lorillard raised the question presented here before the trial court and the Court of Appeal, and each court resolved the issue.

Finally, respondents improperly raise an argument on the merits of this case in opposition to the petition, claiming that Lorillard cannot satisfy the tests proposed for imposition of punitive damages on successors by courts on either side of the split in authority, but the record is to the contrary.

The petition for writ of certiorari should be granted.

Dated: April 23, 1998.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ, Plaintiffs, v. RAYBESTOS-MANHATTAN, INC., et al., Defendants.	NO. 965245 **DEFENDANT LORILLARD, INC.'S BRIEF DENYING PLAINTIFFS' RECOVERY OF PUNITIVE DAMAGES**

I. INTRODUCTION

Lorillard, Inc., as a successor corporation, should not be held liable for any punitive damages awarded to the plaintiffs. Plaintiffs seek to recover punitive damages against Lorillard, Inc. for injuries allegedly caused, in part, by plaintiffs' use of Kent cigarettes, which employed asbestos-containing filters. These cigarettes were produced from 1952 to 1956, and at no time after 1956 were these cigarettes available.

P. Lorillard, a corporation which had been in existence since 1760, manufactured and distributed these allegedly defective cigarettes. In 1968, however, Lorillard, Inc. succeeded P. Lorillard; in no way was Lorillard, Inc. directly or indirectly involved with or responsible for any decisions regarding the production, distribution, or marketing of these asbestos-containing cigarettes. In fact, these cigarettes were on the market for more than a decade before Lorillard, Inc. even came into existence. In short, since Lorillard, Inc. had no control over the decisions to produce these cigarettes, it should not be held responsible for any punitive damages. Given the overriding purposes of punishment and deterrence which underlie an award of punitive damages, as construed under California law, Lorillard should not be held liable for any punitive damages premised on the actions of an allegedly culpable predecessor corporation. Nevertheless, even if the court should find that a successor corporation can be held liable for its predecessor's punitive liability, the plaintiffs have the burden of establishing the grounds for holding the successor liable.

[TEXT DELETED]

B. To Hold Lorillard Liable for the Punitive Damages Based on Its Predecessor's Action Would Subvert the Goals of Punishment and Deterrence.

It would not only be patently unfair to punish Lorillard for defective products for which it had no control, but such an award would in no way deter future bad conduct. California courts hold that punitive damage liability is not imposed on the basis of vicarious fault, noting that punitive damages "will have no deterrent effect if awarded against a party not responsible for the wrong." *Hartman v. Shell Oil Co.*, 68 Cal. App. 3d 240, 249, 137 Cal. Rptr. 244 (1977) (citing 4 Witkin, *Summary of California Law*, 1974, Torts, § 855, p. 3147). Likewise, the California Supreme Court has held that "punitive damages may be visited only upon the actual wrongdoer in proportion to his guilt". *Evans, supra,* 31 P.2d at 395 (emphasis added). Here, P. Lorillard produced the asbestos-containing cigarettes from 1952 to 1956; Lorillard, Inc. did not succeed P. Lorillard until 1968 – more than a decade after any of the alleged wrongful conduct occurred. The persons who would bear the brunt of such an award of punitive damages would be current management, directors, shareholders, employees, and customers, all of whom had nothing to do with the alleged misconduct that occurred nearly four decades ago.

Recognizing the qualitatively different nature between compensatory and punitive damages, the court in *Related Asbestos Cases* refused to hold successor corporations liable for punitive damages, even though they

may be liable for compensatory damages premised on the conduct of their predecessors:

> [W]e conclude that California would not expand the reach of (cases holding successor's liable for compensatory damages) to hold Celotex liable for punitive damages under the present circumstances. The justifications underlying successor liability for compensatory damages articulated in *Ray v. Alad* simply are not present in the instant case.

Id. at 822.

In refusing to hold the successor corporation punitively liable, the court in *Related Asbestos Cases* evaluated the California Supreme Court's concerns that warranted holding a successor corporation liable. Specifically, the court noted that "punitive damages provide a windfall to a plaintiff [and if] the plaintiff is unable to recover punitive damages, he will not suffer unrectified injury." *Id.* Furthermore, the court stated that "the assets of successor corporation could arguably suffer such serious depletion as a result of punitive damage suits, that the corporation would be unable to provide compensatory damages to future plaintiffs genuinely in need of monetary recovery." *Id.*

Citing one of the established rationales for strict liability, the court noted that a successor corporation could not easily assume a risk-spreading/role:

> The probability and amount of punitive damages would be extremely difficult to anticipate, and moreover, California law does not permit

> insurance coverage to include liability for punitive damages.

Id. (citations omitted).

In refusing to hold a successor corporation punitively liable, the court further noted that the successor had "sufficiently assumed the 'burden' which 'runs' with its enjoyment of the predecessor's goodwill when it is rendered liable for the product's defectiveness." *Id.* at 823.

In short, the court doubted "that California would choose to expand the aegis of punitive liability in the context of mass product liability litigation." *Id.* (emphasis in original). Such justifications equally apply in this case, thereby warranting the court's refusal to impose punitive damages on Lorillard as a successor corporation.

Furthermore, the imposition of successor liability for punitive damages does not serve an appropriate punishment function because innocent shareholders of Lorillard, the successor corporation, will be punished as a result. *Cf., Western Resources Life Ins. Co. v. Gerhardt*, 553 S.W. 2d 783, 787 (Tex. App. 1977) (when presented with this argument, the court conceded the "logic of [defendant's] argument with respect to their liability for exemplary damages"). Corporations are legal entities, and this fictional existence is their *raison d'etre*. In theory, punitive awards are levied against the corporate fisc (i.e., the corporate shareholders) because the wrongful conduct of corporate employees and agents is charged to the corporation. The wrongful conduct for which shareholders are punished, and from which they are deterred, is their inattention to the actions of the corporate agents. Levying

punitive awards may make some sense when the corporation that employs the tortfeasor is called upon to pay the punitive damages, because presumably the same shareholders who were inattentive to the tortfeasor's action will feel the bite of the punitive award. In short, the effectiveness of this punitive sting hinges on its application to the actual perpetrators.

Applied to a *successor* corporation, however, both the punishment and deterrence functions of punitive liability are misdirected because the punished shareholders are not the ones guilty of inattention. There was no way Lorillard, Inc.'s shareholders, who took over P. Lorillard in 1968, could have controlled the actions of the predecessor corporation, P. Lorillard, from 1952 through 1956, when the asbestos-containing cigarettes were produced. Therefore, hitting a successor corporation's shareholders, who are guilty of no willful or wanton conduct or inattention to the corporate management, with such damages is manifestly unjust and serves no purpose but to grant an unwarranted windfall to an already compensated plaintiffs.

C. To Recover Punitive Damages, the Plaintiffs have the Burden of Proving the Successor Corporation Committed the Wrongful Acts

In light of this rationale of punishment and deterrence underlying punitive damages, the plaintiffs, in order to recover such damages from a successor corporation, have the burden of proving the *successor corporation's* wrongful conduct, and not just that of the predecessor corporation. In *Related Asbestos Cases*, the court faulted

the plaintiffs for failing to meets its burden, noting that the plaintiffs "proffered no evidence [of] *culpable and responsible* officers" in the successor corporation. *Related Asbestos Cases, supra,* 566 F. Supp. 823. Furthermore, although the court in *Marks* mistakenly focused on the corporate acquisition for determining successor liability, it nevertheless required "evidence [to] establish that [the successor corporation] succeeded to the liability of [the predecessor]," clearly implying a burden of proof on plaintiffs' part "before [the successor corporation] may be found liable for punitive damages." *Marks, supra,* 232 Cal. Rptr. at 596. When dealing with the onerous penalty of punitive damages, it is only logical that the plaintiff, who stands to reap a windfall, will have to establish the propriety of holding a successor corporation liable for such damages in order to recover.

Courts in other jurisdictions, acknowledging this compelling need to focus on the actual wrongdoers, place the burden of proving the successor's punitive liability on the plaintiff. For example, the Pennsylvania Supreme Court, in determining whether or not to impose the jury's award of punitive damages against a successor corporation, analyzed separately the propriety of an award of punitive damages, and looked beyond the form of the transaction to determine whether or not those actually responsible for the wrongful conduct were held liable. *Martin v. Johns-Manville,* 469 A.2d 655 (Pa. 1983), *reversed on other grounds,* 494 A.2d 1088 (1985). The court required the plaintiff to prove that the "identity of the successor with its predecessor as to justify the conclusion that those responsible for the reckless conduct of the predecessor will be punished and the successor will be deterred from

similar conduct." *Id.* at 667. Similarly, the New Jersey Supreme Court also required the *plaintiff* to demonstrate that persons involved in the reckless conduct of the predecessor corporation became involved with the successor corporation after the corporate restructuring. *Brotherton v. Celotex Corp.*, 493 A.2d 1337, 1343 (N.J. 1985). While these courts hold that in order for plaintiffs to recover punitive damages, they must identify those who actually committed the wrongful conduct, i.e., that the plaintiffs have the burden of proving the successor corporation's actual wrongdoing, it is equally significant that these courts emphasized the need to focus not on the corporate structure, but on the purposes for which punitive liability was designed.

[TEXT DELETED]

[CT 1566, 1572-77]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ, Plaintiffs, v. RAYBESTOS-MANHATTAN, INC., et al., Defendants.	NO. 965245 **DEFENDANT LORILLARD, INC.'S REPLY TO PLAINTIFFS' TRIAL BRIEF SEEKING PUNITIVE DAMAGES**

Under California law, Lorillard, Inc., should not be held liable for punitive damages purportedly caused by

an asbestos-containing cigarette filter that was manufactured by P. Lorillard Company from 1952 to 1956. P. Lorillard's merger into Lorillard Corporation (a predecessor of Lorillard, Inc.) in 1968 is an insufficient basis under California law to warrant the imposition of punitive liability on the succeeding corporation.

[TEXT DELETED]

Finally, plaintiffs contend that successor liability for punitive damages is constitutional under the United States Supreme Court's recent due process decisions regarding punitive damages, citing *Pacific Mutual Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 125 L.Ed.2d 366 (1993). These decisions, however, do not address the constitutionality of holding a corporation liable for punitive damages for conduct in which the current owners and/or management of the corporation played no part. In fact, factual circumstances involving successor liability such as the circumstances between P. Lorillard and Lorillard, Inc. have not been specifically addressed by the United States Supreme Court. The California Supreme Court, however, has specifically held that "punitive damages may be visited only upon the actual wrongdoer in proportion to his guilt." *Evans*, 31 P. 2d at 395 (emphasis added). Moreover, the California Supreme Court noted in *Ray* that when the United States Supreme Court considers whether an employer who acquires and continues to operate a business succeeds to the prior operator's labor obligations, the Supreme Court "refuses to be bound by [the general rules of state law on corporate succession] where their application would unduly thwart the public policies underlying the applicable labor law." *Ray*, 560 P.2d at 8.

Likewise, given the important "public policies" of punishment and deterrence which form the basis for punitive damages, this Court should critically analyze whether punishing Lorillard, Inc. for conduct wholly unrelated to its actions effectively furthers such policy goals. To do so, in short, denies Lorillard, Inc. of its due process guaranteed under the California and United States Constitutions.

[TEXT DELETED]

[CT 1748, 1753-54]

App. 12

No. A072695

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MILTON HOROWITZ and
SHIRLEY HOROWITZ,

Plaintiffs and Respondents,

v.

LORILLARD, INC., et al.,

Defendants and Appellants.

APPELLANT LORILLARD'S OPENING BRIEF

On Appeal from a Judgment of the
San Francisco County Superior Court
(No. 965245)
Honorable Winton McKibbon, Judge

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[TEXT DELETED]

D. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO AWARD PUNITIVE DAMAGES AGAINST LORILLARD, A SUCCESSOR CORPORATION WHICH NEITHER PRODUCED ASBESTOS-CONTAINING KENT NOR WAS GUILTY OF ANY INDEPENDENT WRONGDOING

The trial court permitted the jury to award $560,000 in punitive damages against Lorillard, rejecting Lorillard's argument that punitive damages were not available on these facts; an unrelated corporation had acquired the company whose conduct was being challenged long after the alleged misconduct had ceased. (RT at 2352-55; CT at 1566-78, 1713-15.) [Footnote deleted]

The United States Supreme Court first addressed the constitutional implications of punitive damage awards in *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1. There, for the first time, the Court held that the rules of due process were properly applicable to punitive damage awards. (499 U.S. at 15-18.) The Court noted, however, that punitive damages had been accepted in the law for generations, and relied upon that history to reject the claim that punitive damages awards inherently violated the due process clause: " ' "If a thing has been practiced

for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" (499 U.S. at 17, *quoting Sun Oil Co. v. Wortman* (1988) 486 U.S. 717, 730.)

But the *Haslip* Court's refusal to invalidate punitive damages *per se* under the due process clause does not mean that an award of punitive damages against a successor corporation without a showing of fault is immune from due process attack. The *Haslip* Court relied heavily on the historical acceptance of punitive damages in the common law. No such historical background exists for the proposition that punitive damages can be imposed on successor corporations without fault.

In fact, the overwhelming consensus of courts around the country is that punishment should not be imposed on innocent parties. As the California Supreme Court held in *Evans v. Gibson* (1934) 220 Cal. 476, 490, since the purpose of punitive damages is punishment and deterrence, the reason for such damages ceases to exist with the death of the wrongdoer.

The law has long recognized that punitive damages "will have no deterrent effect if awarded against a party not responsible for the wrong." (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 249.) For this reason, courts have held, for example, that innocent partners cannot be punished for the fraud of their partners, *Duncan v. Henington* (1992) 114 N.M. 100, 102-03, 835 P.2d 816, 818-19; *In Re WPMK Corp.* (Bankr. D. Haw. 1986) 59 B.R. 991, 997; *Husted v. McCloud* (Ind. 1983) 450 N.E.2d 491, 495, *superseded on other grounds,* Ind. Code § 34-4-30-2;

that punitive damages are only available against a principal for the misconduct of his agent given proof that (1) the agent was unfit and the principal was reckless in employing him; (2) the principal authorized or ratified the conduct; or (3) the agent involved in the misconduct was a managerial level employee of the principal acting within the scope of his employment (*Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d at 822; Restatement (Second) of Torts, § 909); and that punitive damages are not available against the estate of a tortfeasor. (*Jonathan Woodner Co. v. Breeden* (D.C. 1995) 665 A.2d 929, 939-40; *Parker v. Artery* (Wyo. 1995) 889 P.2d 520, 525; *Evans v. Gibson*, 220 Cal.2d at 490; Restatement (Second) of Torts, § 926(b).)

The courts have long recognized that the imposition of punishment upon a party without a finding of fault deprives that party of liberty and property without due process of law. (*St. Ann v. Palisi* (5th Cir. 1974) 495 F.2d 423, 426 ("personal guilt is a fundamental element in the American scheme of liberty"); *Commonwealth v. W. P.* (1992) 417 Pa. Super. 192, 199, 612 A.2d 438, 441 ("Punishment of the innocent is the clearest denial of life, liberty and property without due process of law"); *see TXO Production Corp. v. Alliance Resource Corp.* (1993) 509 U.S. 443, 454 & n. 17 (recognizing that the Court has long held that there are certain constitutional limits beyond which punitive damages may not go); *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional' "); *Weber v. Aetna Cas.*

& Sur. Co. (1971) 406 U.S. 164, 175 (rejecting imposition of burdens on illegitimate alien children, noting the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Southwestern Telegraph & Telephone Co. v. Danaher* (1915) 238 U.S. 482, 490-91 (invalidating penalty under Due Process clause for conduct that involved "no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct"); *Jonathan Woodner Co. v. Breeden*, 665 A.2d at 939-40 ("[T]o punish the innocent ignores our basic philosophy of justice"); *see also Bell v. Wolfish* (1979) 441 U.S. 520 (finding that punishment could not constitutionally be imposed on pre-trial detainees, who retained the presumption of innocence); *Miller v. Carson* (5th Cir. 1977) 563 F.2d 741, 746 & n.6 (same).)

Nor can the plaintiffs mend the constitutional defects in this punitive damage award by claiming that punishment was imposed not on Lorillard, but on P. Lorillard Company, and that Lorillard simply acquired that liability when it acquired the successor to P. Lorillard Company. (*Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1435 (suggesting that punitive damages may be imposed on successor corporation when a de facto merger has occurred, because the surviving corporation acquires the liabilities of its predecessor); *contra In re Related Asbestos Cases* (N.D. Cal. 1983) 566 F.Supp. 818, 825.)

Counsel for the plaintiffs urged the jury repeatedly during her closing argument in the punitive damages phase of the trial to punish *Lorillard*, not the defunct corporation P. Lorillard Company:

> The net worth of Lorillard is $402,195,000. That's net worth. That's after all of the salaries have been paid, after all the capital improvements have been made, after any debt has been paid. That's the balance sheet at the bottom after everything is taken out. . . . That's what net worth is. And they made $402,000,000. This is 1990 – up till June of '95, I believe the date is; as of June 30th, 1995 . . . an in order to punish a company, you can't give them a two-dollar fine. Because a two-dollar fine to a $402,000,000 company is like slapping them on the pinky. They'd barely feel it. They wouldn't have any response to it. You've got to send a large enough message for it to have an effect, for them to feel it.

(RT at 2325.)

> I would suggest that it should be larger for Lorillard, because they . . . have more money, so they need to be told in greater terms that this is not something that companies should do.

(RT at 2326.)

> And you need to tell them it was not a good idea. It wasn't a good idea back then to put out a product that they hadn't tested, and when they tested found out it caused harm and it isn't a good idea today – and, by the way, in doing that, you are telling them and you are telling every other company: Don't do that kind of reckless behavior . . . The deterrent effect is to send a message to these companies that they shouldn't behave or engage in this behavior again. They are both still marketing products. They are both still out there selling things. And if you send them a message that says it's okay to do this, then that message gets passed on to the

> products that they sell today and that they sell into the future, and that is something that shouldn't be done.

(RT at 2327.)

Counsel for the plaintiffs invited the jury to impose punishment on Lorillard based upon its current activities and its current worth. Although counsel erroneously told the jury that Lorillard and P. Lorillard were the same company (RT at 2327-28), there was not a scintilla of evidence in the record showing that Lorillard did anything wrong. Imposing punitive damages against Lorillard without such proof violated the due process clause of the Fourteenth Amendment.

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No. A072695

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FIVE

MILTON HOROWITZ and
SHIRLEY HOROWITZ,

Plaintiffs and Respondents,

v.

LORILLARD, INC., et al.,

Defendants and Appellants.

APPELLANT LORILLARD'S REPLY BRIEF

On Appeal from a Judgment of the
San Francisco County Superior Court
(No. 965245)
Honorable Winton McKibbon, Judge

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3. The Imposition of Punitive Damages Against A Party Without Evidence of Wrongdoing Violates the Due Process Clause of the Federal Constitution

Lorillard demonstrated that to the extent the trial court imposed punitive damages without evidence of wrongdoing, the judgment violated the Due Process clause of the United States Constitution. (AOB at 61-65.) Although the United States Supreme Court refused to invalidate punitive damages *per se* under the due process clause in *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, that refusal was based in part upon the long history in the American and English common law of punitive damages. (499 U.S. at 15-18.) No such historical background exists for the imposition of punitive damages upon innocent parties; in fact, the courts have long recognized that the imposition of punishment on parties without a finding of fault represents the most fundamental due process violation. (AOB at 63-65.)

Plaintiffs offer virtually no response to Lorillard's argument. First, plaintiffs argue that the Supreme Court invalidated a punitive damages award for the first time in *BMW of North America, Inc. v. Gore* (1996) ___ U.S. ___, 116 S.Ct. 1589, a case which plaintiffs claim "turned on a unique set of facts." (RB at 93-94.) Lorillard has obviously not contended differently, since Lorillard did not cite *BMW* in its opening brief. Lorillard's position before this Court is that the imposition of punishment without a finding of wrong-doing is a violation of the due process clause, a principle recognized by the United States

Supreme Court as long ago as 1915. (AOB at 64-65 and cases cited therein.)

The trial court denied Lorillard's motion for a directed verdict and permitted the jury to impose $560,000 in punitive damages despite that the record showed no evidence whatever of wrongdoing by Lorillard. The imposition of punitive damages against Lorillard on this record was a violation of Lorillard's rights to due process of law. The judgment should be reversed and remanded for a new trial.

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